Covid-19

What, When, & Where?

Travis Ternes

INFECTION FROM COVID-19 WOULD NOT LIKELY BE COVERED UNDER THE KANSAS WORKERS COMPENSATION ACT.

Construing COVID-19 as an Accident

An infection from COVID-19 would not likely fit the definition of an accident under the Kansas Workers Compensation Act (the "Act"). K.S.A. 44-508(d) defines an Accident to mean:

"an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form."

It is difficult to show a specific time and place of occurrence that produces symptoms at the time and occurs in a single shift for COVID-19. Currently, the science says that the symptoms can take up to 14 days to manifest. Even assuming symptoms occur during the shift when the person thinks he or she encountered COVID-19, there would be 14 days of tracking possible other contacts. Moreover, it is rare for most infections of any kind to show up immediately. That alone probably keeps this from being an accident.

The temptation would be to argue that it occurs over time from repeated exposure to other peoples, similar to a repetitive trauma. However, it would require a specific action at work causing some type of trauma. This becomes different for exposure to a disease simply by attending a person's regular employment. Does going to work regularly at a location create more exposure than the public in general? Moreover, repetitive trauma shall in no case be construed to include an occupational disease. K.S.A. 44-508(e). Case law prior to the 2011 amendments allowed for a claimant to argue that an occupational disease occurred through repetitive trauma but that is no longer the case.

COVID-19 is more likely be construed as an occupational disease.

Occupational Disease Definition and Disease of Ordinary Life

Occupational diseases are treated the same as an injury under the Act. K.S.A. 44-5a01(a). An occupational disease:

"shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases, except that compensation shall not be payable for pulmonary emphysema or other types of emphysema unless it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman, but only to the extent such condition was so contributed to and aggravated by the employment."

The statute excludes ordinary diseases of life and condition to which the general public is or may be exposed. The Act does not define this term but the appellate review has seen one case that analyzed the term of art. Ordinary diseases of life are "commonly encountered diseases, such as the flu, to which the general public is equally at risk of suffering without regard for the person's employment." *Strome v.N.R. Hamm Quarry*, Docket No. 162,253, at 4 (WCAB Jan. 1996) (remanded).

The hazard of the disease must come from the employee's occupation. Strome v. N.R. Hamm Quarry, No. 78,886, 1998 Kan. App. Unpub. LEXIS 1200, *6 (Kan. App. 1998) (unpublished). "Ordinary diseases of life" are not compensable because these diseases develop without exposure to a hazard particular to the workplace. Id. "For example, the Board noted that the flu would be an ordinary disease of life… Because the risk of contracting the flu is ubiquitous, the flu is not an occupational disease." Id. at *6-7.

What could be more ubiquitous than a disease that caused a global pandemic? It is contagious enough that we have numerous guidelines to follow from the CDC and the Kansas Department of Health and Environment that require social distancing of six feet from anyone not in your household. COVID-19 is and frequently compared to flu in terms of both transmission and symptoms. Strome and the Board's example is the only analysis attempting to define "ordinary diseases of life."

COVID-19 is most likely a disease of ordinary life but there could be room for argument with certain types of employment and certain fact scenarios.

Elements Required to Prove Occupational Disease

If COVID-19 is not considered an ordinary disease of life for a particular case, the claimant still must prove that it more likely than not came from the conditions of employment. This requires proving three elements:

1) The occupational disease must arise out of and in the course of employment;
2) The occupational disease must result from the nature of the employment in which the employee was engaged; and
3) The occupational disease must have actually been contracted while the employee was engaged in his or her employment.

COVID-19 must arise out of and in the course of employment. An injury arises out of employment if it arises out of the nature, conditional, obligations and incidence of employment.

Because occupational diseases are to be construed as injuries, the definition and exclusions to "arising out of and in the course of employments" under K.S.A. 44-508 likely apply. *See* K.S.A. 44-5a01(a) ("…an occupational disease as defined in this section shall be treated as the happening of an injury by accident…")

In order for an occupational disease to have resulted from the nature of employment, the claimant must show that the disease has its origin in a special risk of connected the claimant's particular employment and to have resulted from that source as a reasonable consequence of the risk. Therefore, the nature of employment must create a particular and peculiar hazard or a special risk for the disease. *See Box v. Cessna Aircraft Co.*, 236 Kan. 237, 244, 689 P.2d 871 (1984). The statute excludes hazards of attending employment in general. K.S.A. 44-5a01(b). The focus must be on the nature of employment. It is not be as simple as an office co-worker exposing the claimant to COVID-19 but must show that the nature of the employment created that specific risk.

The final requirement would probably be the most difficult to prove, showing that COVID19 was contracted while the employee was engaged in employment. This is difficult partially for the same reason it is hard to be an accident, COVID-19 can take up to 14 days to manifest symptoms. Few people could hole up in a location without interacting with anyone else or coming into contact with someone. There will be other contacts to point to that physicians would have to admit COVID-19 could come from. Nevertheless, the case law show that the odds improve if the claimant has an identifiable event to point to as a reason for the disease being contracted while engaged in employment.

There is relatively little appellate case law interpreting occupational diseases under the Kansas Workers Compensation Act. Lack of appellate review is particularly desolate after the 2011 amendments to the Act. However, there are a couple recent Board cases to draw examples from.

A good case example of the medical testimony denying an occupational disease claim comes from *Roark v. Orica USA, Inc.* No 1,070,623, 2017 KS Wrk. Comp. Lexis 82 (WCAB Jun 1, 2017). In *Roark*, the claimant worked in an explosive manufacturing shop that would have dust in the air while mixing the compounds together and he wore no protective equipment. Claimant expressed his concerns to his supervisors about the dust but the supervisors told him there were not enough particles per million to do any damage.

The claimant began noticing fatigue and shortness of breath in the summer of 2013 and told his supervisors, who did nothing. The claimant continued working his regular shifts through 2013 but his employment ended on January 26, 2014. He went the hospital the next day after feeling sick and was diagnosed with pneumonia. The claimant then saw a pulmonologist and eventually an infectious disease specialist. A physician diagnosed him with pneumonia, mycobacterium avium complex (MAC) and chronic obstructive pulmonary disease (COPD).

There is a significant treatment history outlined in the decision. The ALJ and Board described in detail specific testimony from five physicians, Dr. Bieri, Dr. Ndukwu, Dr, Schmidt, Dr. Parmet and Dr. Kingstone. Dr. Bieri was the only physician to provide a favorable causation opinion for the claimant. Dr. Kingstone testified that the work environment did not increase any unique risk to exposure of the MAC and that the chemicals were not likely the cause of pneumonia or COPD. Dr. Schmidt could not say within a reasonable degree of medical certainty that any of the three diseases were caused by dust exposure at work. Rather, he acknowledged that the claimant could have been exposed to MAC and pneumonia could come from anywhere. Dr. Parmet stated that MCA infections are generally non-occupational. The Board found that the overwhelming weight of evidence supported a finding that the claimant failed to prove that his work environment was the likely cause of his diseases. *Id.* at 10.

Contrast *Roark* with *Hibbs v. Mies & Son Trucking, LLC*. 2020 KS Wrk. Comp. LEXIS 250 (WCAB April 2020). In *Hibbs*, the claimant hauled raw milk between dairies and plants in Kansas, Oklahoma, Texas and New Mexico. On December 24, 2018, the claimant, accompanied by his stepdaughter, hauled a load to Clovis, New Mexico and encountered a bad dust storm that lasted four or five miles. The cab was not airtight and his stepdaughter cleaned dust out the following day.

Claimant was a longtime cigarette smoker and frequently coughed in the mornings. In mid-January his stepdaughter started coughing as well and received treatment from a doctor. Around the same time, the claimant noted his cough to be more frequent. Hibbs continued coughing and in March 2019, he went to a doctor who diagnosed him with pneumonia. However, on April 7, 2019 Hibbs had a two-hour coughing attack and went to the hospital the next day. A biopsy showed a fungal infection from coccidioidomycosis spores and Hibbs was referred to Dr. Thomas Moore, an infectious disease specialist. Dr. Moore wrote an opinion letter recognizing that coccidioidomycosis is found only in the lower Sonoran Desert region, which includes parts of the southwestern United States and northern Mexico. He went on to express that Hibbs travel to Texas and New Mexico as part of his work more likely than not was the prevailing factor that caused him to contract coccidioidomycosis. This opinion was not contradicted by any other physician but the respondent cited an Arizona case that found coccidioidomycosis was an ordinary disease of life and argued that the statute imposes no limit on ordinary disease of life to limit it geographically. The ALJ and Board member, on review of a preliminary hearing, both found that the claimant suffered from an occupational disease.

The contrast between *Roark* and *Hibbs* is significant because in *Hibbs* the claimant's work required him to travel out of state to a location where the disease exists. The disease is not endemic in Kansas or anywhere outside of the Sonoran Desert region meaning it is not ubiquitous. He also had a specific event to point to as evidence of when he contracted the disease and a physician to opine that dust is the common method to contract the virus. On the other hand, in *Roark* most the physicians testified that the MAC pneumonia could have come from anywhere, as opposed to only one region of the United States and part of Mexico. One physician testified and testing showed that the MAC and COPD were not likely to come from the chemicals and neither is generally an occupational hazard outside of those individuals performing lab work on the viruses.

Proving all three elements for COVID-19 will be difficult. Arising out of and in the course of employment would probably be the easiest requirement. A claimant could point to jobs that result in a higher risk of exposure that require the employee to care for infected persons, such as healthcare or prisons.

Proving that the disease was contracted at work would probably be the most difficult element though. At any point during the incubation period, the employee could have contracted it. Moreover, this involves the same reasoning behind an ordinary disease of life exclusion because COVID-19 could have come from many other sources. You would need to investigate all the other members of a persons household to see about different contact points, look at the claimant's social media and of course talk to coworkers for possible sources other than work.

On top that, the Board has applied the prevailing factor standard of causation to evaluating whether work was the cause of an occupational disease. *Hibbs,* 2020 KS Wrk. Comp. LEXIS 250. The occupational disease act is supplementary to and construed as a part of the Kansas Workers Compensation Act. K.S.A. 44-5a22. It stands to reason that the prevailing factor standard of causation applies to occupational diseases because of the requirement to treat occupational diseases as an injury. *See Moore v. Cimarex Energy Co., Inc.* No. 110,192, 326 P.3d 1090 (Kan. App. 2014) (unpublished) (Judge Fuller found in part that exposures at work caused temporary aggravations of preexisting asthma, which was not compensable under K.S.A. 44-508(f)(2). Docket No. 1,057,905 at *2 (WCAB June 2013)).

As it stands, claimants face an uphill battle in proving that COVID-19 is compensable under the Act. It is not impossible should the ALJ, Board or appellate courts find that COVID-19 is not a disease of ordinary life. This would be highly dependent on the nature of employment. The best chance of coverage as an occupational disease would be for healthcare workers, laboratory researchers or other similar positions specifically exposed to COVID-19 as a condition of employment.

Even then, these cases will be highly fact specific. If someone the claimant lives with gets sick also, would you get a chicken and the egg situation? Would Facebook photos or coworkers/managers be able to provide evidence that the claimant is doing anything other than going to home and work? If the claimant says he or she simply drives from home to work but must get fuel, did they touch the fuel dispenser or go inside for a soda? Even assuming claimant is taking all the precautions, there will be other potential points of exposure and physicians would likely admit that COVID-19 could have come from any number of other contacts. It stands to reason this is the logic behind excluding diseases of ordinary life.

The Kansas legislature enacted House Bill 2007 attempting to create a rebuttable presumption that COVID-19 arouse out of and in the course of employment. However, this bill died in committee during the special session in 2020.

COVID-19 would not likely be considered an injury by accident, repetitive trauma or an occupational disease under the Kansas Workers Compensation Act.

MISCELLANEOUS

The notice requirements for an occupational disease are different than the standard. Notice of disablement or death from an occupational disease needs to be given (1) in writing; and (2) within 90 days of the disablement or death. K.S.A. 44-5a17. However, if one fails do provide such notice there is still a long shot to succeed as "[f]ailure to give either of such notices shall be deemed waived unless [an] objection is made at a hearing on the claim prior to any award or decision thereon." K.S.A. 44-5a17. This is unlikely to save a claim, as such failure to object is likely malpractice. Also, this requirement will often be moot as actual knowledge of the disablement by the employer, or the responsible superintendent or foreman equates to written notice.

Even so, within 1 year from disability or death a claim from an occupational disease must either (1) be filed with the workmen's compensation director; or (2) served on the employer. Failure to do so bars the claim forever—so long as an objection regarding a failure to timely file/serve is made prior to any ward or decision. However, even this requirement is waived if (1) the employer or insurance carrier makes payments; or (2) within one year of the accident or disablement the employer or its insurance carrier leads the employee/workman/claimant to reasonably believe that notice or claim has been waived. K.S.A. 44-5a17.

In addition, the occupational disease statutes allow for defense of willful failure to use a guard or protection against disablement required pursuant to any statute and provided for him, or a reasonable and proper guard and protection furnished by the employer. K.S.A. 44-5a05. The employer could raise this defense for failing to wear a mask or failing to maintain a distance. You also run a serious risk of violating an internal safety provision if anyone traveled when they were banned from doing so under the employer's policy. Many employers have enacted such policies.

END